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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 102

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, *Petitioner,*

vs.

NEEDHAM PACKING COMPANY, d.b.a. SIOUX CITY DRESSED BEEF, A CORPORATION, *Respondent.*

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the Woodbury County District Court is unreported and is printed at R. 42. The opinion of the Supreme Court of Iowa, including the dissenting opinion, has been reported at 119 N.W. 2d 141, and is printed at R. 55.

Jurisdiction

The judgment of which review is sought here was entered by the Supreme Court of Iowa on January 15, 1963 (R. 55). A petition for certiorari was filed in this Court on April 6, 1963, and granted on June 17, 1963 (R. 62).

Petitioner claims jurisdiction exists in this Court by vir-

tue of 28 U.S.C. 1257(3). For the reasons stated below, respondent contends that jurisdiction has been invoked prematurely. The decision of the Supreme Court of Iowa is not a final and complete judgment disposing of all elements of the present controversy between the parties.

Questions Presented

1. Whether a decision by the Iowa Supreme Court, under an interlocutory appeal procedure afforded by Iowa law, disposing of a federal issue raised by complaint and answer, but remanding the case for further proceedings, constitutes a final and complete order for purposes of review by this Court pursuant to 28 U.S.C. 1257(3), where the same issue passed upon by the Iowa Supreme Court is also involved in respondent's counterclaim awaiting hearing in the trial court.

2. Whether the decision of the Supreme Court of Iowa conflicts with applicable rulings of this Court, insofar as it held that a walkout by members of the petitioning union was such a breach of a no-strike clause in the collective bargaining agreement between the petitioner and the respondent company as to permit the respondent to terminate the contract, thereby relieving respondent of the duty of arbitrating alleged grievances arising subsequent to the walkout, after respondent had warned the petitioner and its members that respondent was terminating the collective bargaining agreement if petitioner's members refused to return to their jobs.

Statutes Involved

Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a), is set forth at p. 2 of petitioner's brief.

Rule 332(a) of the Iowa Rules of Civil Procedure provides in pertinent part that:

> "Any party aggrieved by an interlocutory ruling or decision, including one appearing especially whose objections have been overruled, may apply to the supreme court or any justice thereof to grant an appeal in advance of final judgment. Such appeal may be granted after notice and hearing . . . on finding that such ruling or decision involves substantial rights and will materially affect the final decision, and that a determination of its correctness before trial on the merits will better serve the ends of justice. . . ."

Rule 105 of the Iowa Rules of Civil Procedure provides as follows:

> "The court may, in its discretion, and must upon application of either party, made after issues joined and before trial, separately hear and determine any point of law raised in any pleading which goes to the whole or any material part of the case. It shall enter an appropriate final order before trial of the remaining issues, adjudicating the point so determined, which shall not be questioned on the trial of any part of the case of which it does not dispose. If such ruling does not dispose of the whole case, it shall be deemed interlocutory for purposes of appeal."

Statement of the Case

1. *The Parties and the Collective Bargaining Agreement.* The respondent is a corporation which operates a meat packing plant in Sioux City, Iowa (R. 2). It is engaged in an industry affecting commerce within the meaning of applicable provisions of the Labor Management Relations

Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a). The petitioner is a labor organization within the meaning of applicable provisions of the National Labor Relations Act, 49 Stat. 450, 29 U.S.C. 152(5), and of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a). The petitioner, a local union, maintains its principal place of business in Sioux City, Iowa (R. 1). The petitioner is an affiliate of the United Packinghouse, Food and Allied Workers, AFL-CIO (R. 1). The international union has an office and field representative at Des Moines, Iowa (R. 21).

On or about October 1st, 1960, the petitioner (Local Union No. 721) and the international union to which it belongs entered into a collective bargaining agreement with the respondent (R. 7-22). Under paragraph 2 thereof, the respondent recognized the international union and the petitioner "as the sole and exclusive bargaining agency for all the production employees employed by the Company," excluding certain categories of employees not pertinent here (R. 7).

The collective bargaining agreement between the parties provided in paragraph 9 thereof that, during the period of its existence, "the employees shall not engage in, and the Union shall not call or sanction, any slowdown, work stoppage, or strike, and no lockout shall be inaugurated by the Company." (R. 8-9).

The collective bargaining agreement also contained provisions covering the adjustment of grievances between the petitioner and the respondent (R. 18-20). Paragraph 33 (c)(5) thereof provided that "in the event a dispute shall arise between the Company and the Union with reference to the proper interpretation of (sic) application of the provisions of this contract and such dispute cannot be settled by mutual agreement of the parties, such dispute shall

be referred to a board of arbitration upon the request of the Union. . . ." (R. 19). No similar right to seek arbitration was afforded the Company under the contract. The collective bargaining agreement also required that any "grievance must be presented within fourteen (14) days of the occurrence giving rise to such grievance. . . ." If this procedure was not observed, the agreement provided that the grievance "shall be considered completely waived." (R. 19).

2. *The Walkout and Ensuing Strike.* On May 11, 1961, an employee of the respondent and a member of the petitioning union, Anton Stamoulis, left his job and refused to proceed under the grievance procedure by putting his grievance in writing as required by the collective bargaining agreement (R. 40). On that same day, May 11, 1961, 190 other employees, all members of Local No. 721, the petitioner herein, walked off their jobs (R. 41). This action was taken in the face of the respondent's warning that it would be considered a breach of contract (R. 41). The petitioner, the exclusive bargaining agent for petitioner's production employees, admitted in the trial court that employees represented by it "left their jobs at [respondent's] . . . plant on or about May 11, 1961." (R. 43). The trial court, after oral hearing and the filing of briefs (R. 42), but without the taking of evidence, found that there was "no substantial dispute here as to the facts" (R. 48); employees represented by the petitioner "did engage in a walkout" on May 11, 1961 (R. 44). The respondent denies, however, that it authorized any walkout by the 190 employees on May 11, 1961 (R. 34).

On May 12, 1961, respondent sent a letter to each of the 190 striking employees, advising them that their action in leaving their jobs was in violation of the contract between the union and itself. The letter also advised that

if they did not immediately return to work, their jobs would be filled by permanent replacements. The letter further informed the striking employees that the alleged cause of leaving their employment, the discharge of Stamoulis, would be processed as a grievance under the terms of the collective bargaining agreement (R. 41). On or about May 15, 1961, at a meeting of petitioner, Local 721 and its members unanimously rejected the offer of the respondent that they return to work and that the Stamoulis case be handled as a grievance, informing respondent of their rejection of its offer on or about May 15, 1961 (R. 41). The respondent treated this rejection as a termination of the employment of Stamoulis and the 190 other employees who had left their jobs on May 11, 1961 (R. 41).

The walkout and the strike which began on May 11, 1961 has continued to date, and picketing in front of the Company's premises has also been continuous since the first day of the walkout (R. 31). The petitioner, in its reply to the respondent's answer in the trial court, denied that it struck against the respondent, or, as alleged by the respondent, set up picket lines in front of the Company's premises. However, as previously stated, petitioner admitted that certain of its members within the bargaining unit represented by it did leave their jobs on or about May 11, 1961 (R. 34), and has not denied respondent's assertion that at a meeting of petitioner on May 15, 1961, these members rejected the offer of respondent that they return to work (R. 41).[1]

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[1] In an unreported opinion and decree issued on July 15, 1961, in *Needham Packing Co., Inc., d.b.a. Sioux City Dressed Beef, a Corporation* vs. *United Packinghouse, Food and Allied Workers, AFL-CIO Local No. 721, et al.*, No. 83519 (Equity), the District Court for Woodbury County, Iowa, found that Local No. 721 had "advocated and participated," and certain of its officers and members had engaged in, "mass picketing, threats and violence and intimidation of employees" of the respondent. The Court

On July 5, 1961, a written grievance in behalf of Stamoulis was filed with the respondent, and on the same day a grievance protesting the discharge of 190 other employees was also submitted by the petitioner to the respondent (R. 22). On July 12, 1961, the respondent advised the petitioner's field representative that it was declining the request of July 5, 1961, to process the alleged grievances submitted, on the ground that the petitioner and its members by their conduct had repudiated and terminated the collective bargaining agreement of October 1, 1960 (R. 29).

3. *Proceedings Below.* On August 26, 1961, the petitioner filed a suit in equity in the District Court of Woodbury County, Iowa, invoking that Court's concurrent jurisdiction under Section 301(a) of the Labor Management Relations Act of 1947 (R. 1-7). By its petition, the union sought a decree compelling the respondent to submit the grievances filed with the Company on July 5, 1961 to arbitration, allegedly in accordance with the provisions of the collective bargaining agreement (R. 7-21). The respondent answered and filed a counterclaim for damages in the amount of $150,000 for petitioner's breach of the contract of October 1, 1960. In addition, respondent pleaded certain affirmative and legal defenses (R. 30-34). One of the respondent's basic contentions was that petitioner and its members had engaged in a walkout and a strike, contrary to the no-strike clause of the collective bargaining agreement (R. 31). Respondent contended below, and asserts here, that the petitioner's "election of a strike" under the circumstances presented "constituted a waiver of any right" of the petitioner to proceed with the grievances which it had submitted on July 5, 1961 (R. 32). As stated above, petitioner denied

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found that such mass picketing, threats, violence and acts of intimidation were "unlawful," and it thereupon issued an injunction against such acts, the injunction having remained in effect since that time.

that it had engaged in any strike action and asserted that "questions concerning any alleged waiver of [its] right to arbitrate . . . [concern] the merits of the grievance . . . and must be determined solely by the arbitrator. . . ." (R. 34-35). The petitioner did not request that proceedings under the counterclaim be stayed pending arbitration of the alleged grievances submitted on July 5, 1961 (R. 38-39), but asked that the counterclaim be dismissed (R. 39).

After the pleadings had been closed, the respondent made application to the trial court to rule upon three points of law, as permitted under Rule 105 of the Iowa Rules of Civil Procedure (R. 41-42). After a hearing on the application, the District Court of Woodbury County sustained the contentions raised by the respondent (R. 50). The petitioner promptly applied for and was permitted to take an interlocutory appeal to the Supreme Court of Iowa (R. 51-54). The Supreme Court affirmed the lower court in its decision of January 15, 1963, holding therein, with one Justice dissenting, that the petitioner had waived its right to arbitrate by a walkout in breach of the no-strike clause of the collective bargaining agreement (R. 55-60). The Supreme Court noted that it was "not seriously contended in this court that the 190 workers did not walk off the job and are still refusing to return thereto." (R. 56).[2]

Summary of Argument

I

Respondent respectfully suggests that the writ of certiorari was improvidently granted and that the Court should not have assumed jurisdiction at this stage in the proceeding to review the decision below. The ruling of the Supreme

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[2] 119 N.W.2d 141.

Court of Iowa is not a final or complete order, ripe for review at this time. Under Iowa procedure, the appeal which the petitioner took to the Supreme Court of Iowa was an interlocutory appeal, *Ruth & Clark* v. *Emery*, 235 Ia. 131, 15 N.W.2d 896. Respondent's counterclaim still awaits trial before the lower court which has not yet entered any order disposing of the entire controversy between the parties. If petitioner should prevail in the trial court and defeat the counterclaim by a showing that that strike or walkout was not in violation of the no-strike provision, applicable procedures are available under Iowa law on the basis of which petitioner could move either for a new trial on its original complaint or for reconsideration of the earlier ruling of law by the trial court. Actually, the decision of which petitioner has sought review in this Court is not *res judicata*, but rather has established only the law of the case and is subject to reconsideration by the Iowa courts at any time up to entry of a final judgment disposing of both the complaint and the counterclaim.

II

A. Petitioner argues, in effect, that the very existence of an arbitration petition in a collective bargaining contract in every instance obligates the employer to arbitrate all issues of alleged grievances of the union, regardless of the terms of the contract and whether or not the union has observed its contractual obligation not to strike. It is true that authoritative decisions of this Court have rejected an artificially rigid interpretation of the statement in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 455, that "the agreement to arbitrate grievance disputes is the *quid pro quo* is an agreement not to strike", and have required arbitration despite the occurrence of a walkout or strike, *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254. Nevertheless, the close

correlation of the arbitration and no-strike clauses has been repeatedly acknowledged by this Court. *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238; *Drake Bakeries, Inc.* v. *Bakery Workers, supra.* These decisions, we believe, recognize that the parties to a collective bargaining agreement are at liberty to draft an arbitration provision as broad or as narrow as they deem suitable. We find nothing in these cases which lends support for the mechanical standard which the petitioner urges this Court to apply here and which would ignore completely the intimate relation of the arbitration and no-strike provisions of a collective bargaining contract.

B. Respondent respectfully suggests that if it be announced as the law that an employer is bound always to his agreement to arbitrate, whatever the terms of the agreement or the actions of the union, the very interests which the arbitration provision is intended to protect would be put in jeopardy. Employers "will pause long before committing themselves to obligations enforceable against them but not against their unions". *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 227 (dissenting opinion).

III

A. *Drake Bakeries* v. *Bakery Workers, supra,* sets forth the circumstances which will be looked to as determinative in deciding whether a union's breach of a no-strike provision has the effect of freeing the employer of a commitment to arbitrate grievances, or other disputes. These are: the terms of the arbitration provision itself; the attitude of the employer, following the alleged breach by the union, regarding the continuity of the contract; and finally, the seriousness of the breach, its nature and duration.

(1) The arbitration provision involved here, as the provision before this Court in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, provides solely for the processing of *employee* grievances but not those of the employer. So far as employer grievances are concerned, the respondent was free to pursue such other remedy as might be available and, indeed, the petitioner has conceded that no "claim for damages [for the petitioner's] alleged violation of a no-strike clause is the subject of grievances or otherwise before [the Court]. . . ." If the respondent did not bargain away its right to maintain an action for breach of the no-strike clause, surely this is additional significant evidence that the scope of the arbitration clause did not reach to embrace walkouts or strikes amounting to a substantial breach of the contract.

(2) Respondent believes it sound law and sensible labor-relations policy to insist on evidence of unequivocable repudiation by an employer following an alleged violation of a no-strike clause when the claim is raised that the strike amounted to such a material breach of the collective bargaining agreement as to permit the employer to terminate it. There are occasions when the fact of repudiation is not fairly arguable. *Cf. United Garment Manufacturing Co. v. Minnesota Joint Board*, 211 F. Supp. 414, (D. Minn., 1962), where the employer closed down the plant. Surely, however, a cessation of operations is not the only manifestation sufficient to establish an abandonment or repudiation by an employer of a collective bargaining agreement following an extended strike. The record in the instant case clearly shows that the respondent repudiated its collective bargaining obligations unequivocally and in full, as a direct result of the walkout and strike by members of the petitioner's union.

(3) Unlike *Drake Bakeries, supra,* the Iowa courts were

not dealing with a "one day strike", or any trivial infraction of the no-strike clause, but a strike of extended duration with, "mass picketing, threats and violence and intimidation of employees" of the respondent, significant elements of the bitter and continuing dispute.

B. In a doubtful case, the presumption is proper which favors arbitration's coverage, *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583. On the other hand, the burden shifts where a party seeking arbitration presses so far as to claim that, not only the merits of the grievance, but also the question of arbitrability is excluded from judicial determination. The petitioner here seeks to avoid the force of the usual presumption in favor of initial judicial determination of the issue of arbitrability. It maintains that in deciding that the strike involved in this case was a violation of the no-strike clause the Iowa Supreme Court has usurped the function of the arbitrator, because it was impossible for that court to decide that the strike constituted a waiver of arbitration without intruding upon the fundamental grievance question, that is, whether the participation in the strike by members of the petitioner's union was just cause for their discharge.

(1) We agree, of course, that not every strike is a violation of the no-strike clause. Some are, however; the strike underlying this case is one. It arose over alleged seniority rights (R. 39), one of the categories of economic issues which the union had contracted to put to arbitration, not self help. In electing to pursue the latter it waived the former.

(2) The question of a breach of the no-strike clause represents an issue expressly removed from the applicability and the scope of the arbitration procedure established under the contract between the petitioner and

respondent (R. 19). Neither the trial court nor the Iowa Supreme Court passed upon any question of the justness of the discharges in the wake of the walkout and strike. They held only: that under the circumstances of this case, if the petitioner had a remedy it was not arbitration, which it had waived by striking; that the walkout and strike in the setting of this case justified the respondent in repudiating the contract, including the arbitration clause; and that the respondent did repudiate the agreement.

C. Petitioner attempts to attack the decision below on the grounds that the pleadings reveal that there is a dispute as to whether a strike occurred. However, the pleadings in this case have been pierced through admissions made therein by the petitioner. These establish that 190 employees, all members of the petitioner's union, walked off their jobs and struck the plant, and that the walkout and strike was sanctioned and supported by the petitioner after knowledge of the facts. No serious contention to the contrary was made in the courts below and should not be permitted now. Moreover, even if the petitioner had a complaint about the propriety of the Iowa procedure observed in this case, or the adequacy of the Iowa courts' conclusions regarding the facts of the walkout, the strike, and the termination of the agreement by the respondent, surely that complaint cannot be reviewed in this Court, in the absence of any showing that important federally protected rights were impaired thereby. *Grayson* v. *Harris*, 267 U.S. 352, 357.

IV

Respondent did not expressly urge below and abandons here the argument that petitioner had waived its rights under the arbitration provision by filing an unfair labor practice charge with the National Labor Relations Board.

ARGUMENT

I

The Judgment of Which Review Has Been Sought Is Neither Final Nor Complete

By grant of the writ of certiorari, this Court has assumed jurisdiction of this cause. We respectfully suggest that the writ of certiorari was improvidently granted, and that this Court should not have asserted jurisdiction at this stage in the proceeding to review the decision below.

Under 28 U.S.C. 1257(3), this Court reviews only final judgments of state courts. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 67. It is also the well established rule that a state court judgment, to be reviewable here, must be complete in that it finally disposes of all elements of the controversy. *Cotton* v. *Hawaii*, 211 U.S. 162, 170. If the judgment is not one which disposes of the whole case on its merits, it is not final. *Bostwick* v. *Brinkerhoff*, 106 U.S. 3, 4. This Court has consistently declined to undertake piecemeal review of the actions of state courts. *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U.S. 99, 101. A judgment, as the Court said in *Market Street R. Co.* v. *R. R. Commission*, 324 U.S. 548, 551:

> "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

The ruling of the Supreme Court of Iowa which this Court has been asked to review in the instant case is not a final or complete order, ripe for review at this time.

It is true that the decision of the Iowa Supreme Court has determined an important federal legal issue in the case. It has decided that a walkout in violation of a no-strike provision in a collective bargaining contract can sustain a judicial determination that the agreement was thereby terminated and the respondent company, against which the walkout was directed, thereafter could refuse to arbitrate disputes arising subsequent to the walkout and after the termination of the contract. The disposition of that issue, however, does not automatically give rise to appealability of the decision of the Iowa Supreme Court. See, *e.g.*, *Cincinnati Street R. Co.* v. *Snell*, 179 U.S. 395; *Laclede Gas Light Co.* v. *Public Service Commission*, 304 U.S. 398, 400.

In determining the finality of a state court judgment, the local law consistently has been regarded as a material, though not decisive, factor. *Gospel Army* v. *Los Angeles*, 331 U.S. 543, 548. The effect which a state court judgment is accorded under the local rules of practice is germane to a determination of whether or not the judgment is final and ready for review in this Court. *Richfield Oil Corp.* vs. *State Board of Equalization*, 329 U.S. 69, 72.

The appeal which the petitioner took to the Supreme Court of Iowa was from a hearing and determination of points of law by the trial court, pursuant to Rule 105 of the Iowa Rules of Civil Procedure. Rule 332(a) of the Iowa Rules permits an interlocutory appeal in such circumstances "in advance of final judgment." For the appeal to be allowed, however, the Supreme Court of Iowa must find that the ruling of the lower court involves substantial rights, "will materially affect the final decision," and that a determination "before trial on the merits" will better serve the ends of justice. Leading commentators on Iowa civil practice have noted that an interlocutory order under Section 332(a) is one which "does not dispose of the cause,

being one that is directed preparatory to a final decision." Messer and Volz, Iowa Practice (West, 1957), Vol. II, p. 363; *Ruth & Clark* v. *Emery*, 235 Ia. 131, 15 N.W. 2d 896.

In affirming the ruling of the lower court, the Supreme Court of Iowa remanded the cause for "further proceedings pending therein." It did not direct the entry of an order or of judgment prior to a final determination of the issues that remain for resolution. Accordingly, there is not presented here the situation where a decision of the highest court of a state leaves open only the performance of a ministerial act on the part of the trial court, *Bacon & Sons* v. *Martin*, 302 U.S. 642, appeal dismissed for lack of finality, but a final judgment subsequently obtained and dismissed for want of a substantial federal question, 305 U.S. 380; *Crescent Creamery* v. *Milk Control Board*, 305 U.S. 559.

Respondent's counterclaim is still before the lower court; it has not been tried. The trial court has not yet entered any order disposing of the entire controversy between the parties. On the trial of the counterclaim, the petitioner will have full opportunity to present evidence and to argue the question whether there was a breach of the no-strike provision of the collective bargaining contract. If petitioner loses on that issue, it will have another opportunity to appeal to the Iowa Supreme Court and ultimately, if necessary, again seek certiorari of this Court. On the other hand, if the union prevails in the trial court and defeats the counterclaim by a showing that the strike or walkout did not violate the no-strike provision of the contract, petitioner will not be without appropriate and available means to reopen in the Iowa courts the federal issue temporarily foreclosed by the January 15, 1963 decision of the Supreme Court of Iowa, i.e., that the union was barred from arbitrating the discharge of employees because of its sanction

of and their participation in a walkout in violation of a no-strike clause.

Rule 244(h) of the Iowa Rules of Civil Procedure authorizes the granting of a new trial on the basis of errors "of law occurring in the proceeding, or mistakes of fact by the Court." Under Rule 247 of the Iowa Rules, such a motion may be made within 10 days after judgment, and under Rule 335, an appeal of a denial of such a motion may be taken within 30 days after the ruling on the motion. Therefore, should the petitioner defeat the counterclaim on the basis of evidence which establishes that the walkout was not in violation of the no-strike provisions of the collective bargaining agreement, under Iowa procedure it would have available to it persuasive grounds on which to move either for a new trial of its original complaint or reconsideration of the earlier rulings of law by the District Court for Woodbury County, and if necessary, to appeal again to the Supreme Court of Iowa.

Indeed, it is doubtful even that resort to a motion for a new trial would be necessary to reopen the petitioner's claim. While the decision of the trial court is, under Rule 105 of the Iowa Rules of Civil Procedure, "final" in the sense that under ordinary circumstances no attack may be made upon it, pursuant to Iowa procedure it was treated as "interlocutory" for purposes of appeal to the Supreme Court of Iowa. Thus, plainly under Rule 332(a) a "final decision" is still to be entered. Together, these rules appear to indicate that the decision is, under State procedure, not *res judicata*, but rather establishes only the law of the case. If this be so, then surely the ruling is subject to reconsideration by the State courts at any time up to entry of a "final decision" disposing of both the complaint and counterclaim in a final judgment. And while arguably

this might be regarded as of no practical consequence if the decision in question here were wholly unrelated to the issues remaining for trial by the Iowa trial court, that plainly is not this case, where an evidentiary hearing on the counterclaim will turn upon issues intimately related to the decision of which petitioner has obtained review by this Court. Moreover, it should be noted that the consideration that trial of the counterclaim might generate additional federal issues also weighs against assigning finality to the decision here in question. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71.

For the foregoing reasons, the decision of the Iowa Supreme Court does not constitute a final and complete judgment ready for review in this Court.

II

This Court Has Not Held that an Employer Will Always Be Compelled to Arbitrate the Breach of a No-Strike Clause

A. *Arbitration and No-Strike Provisions: Meaningfully Correlative Clauses.* Petitioner, in arguing against the decision below, asserts, in effect, that the very existence in a collective bargaining contract of a provision for arbitration of grievances in every instance obligates an employer to arbitrate all issues of all alleged grievances of the union, regardless of the terms of the contract, and whether or not the union has fulfilled its contract obligation to refrain from a strike. Thus, in its brief, petitioner suggests:

> The federal Courts of Appeals and District Court, unlike the Iowa courts, have uniformly held that a claimed breach of a no-strike clause does not prevent the union from obtaining arbitration. Some of the courts have expressly recognized that discharges for

participation in a strike claimed to be in violation of the agreement are arbitrable. In so deciding, these courts have rejected the argument, advanced by Respondent and accepted by the Iowa courts, that the union by its actions has waived or repudiated its right to arbitrate. * * *

Even if the Petitioner here admitted that it had violated the no-strike clause—and Petitioner has denied any violation—*the disputes presented by the grievances should have been submitted to arbitration.* [p. 9; Italics supplied].

The Iowa courts were plainly correct in rejecting this position. In doing so, they can claim recent pronouncements of this Court as support.

To sustain its position, petitioner purports to stand on a series of decisions of this Court and interpretative rulings of lower federal courts which have stressed the preeminent importance of arbitration in preserving industrial tranquility, and which also have rejected an artificially rigid interpretation of the statement in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 455, that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." These decisions, nevertheless, have concurrently emphasized the corresponding importance of the "no-strike" clause, and have duly recognized that the parties to a collective bargaining agreement are at liberty to draft an arbitration provision as broad or as narrow as they deem suitable.

United Steelworkers v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 is one decision cited by petitioner. This Court there noted that "a major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances." [p. 578]. It continued, however, "[C]omplete

effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes" [p. 578], so that "[t]he grievance procedure • • • rather than a strike, is the terminal point of a disagreement." [p. 581]. The concurring opinion emphasized further that "since arbitration is a creature of contract, a court must always inquire when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate a particular dispute." [p. 570].

Petitioner also believes it finds support in the recent decision of this Court in *Drake Bakeries, Inc.* v. *Bakery Workers*, 370 U.S. 254. That decision, emphasizing with respect to the asserted "*quid pro quo*" test that "this Court has prescribed no such inflexible rule rigidly linking no-strike and arbitration clauses of every collective bargaining contract in every situation," concluded that the comprehensive arbitration provision in the contract there in issue required arbitration even of an asserted breach of the no-strike clause. The Court, however, carefully qualified its ruling to assure the employer that:

> "We do not decide in this case that in no circumstance would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union." [p. 265].

In a companion decision, *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, the Court in fact concluded that a party to a collective bargaining contract which, as here, con-

tained a far narrower arbitration provision than that in issue in *Drake Bakeries*, retained that right.

Petitioner relies as well on a group of lower federal court decisions. *International Moulders and Foundry Workers* v. *Susquehanna Casting Co.*, 283 F. 2d 80 (3d Cir., 1960); *United Textile Workers, Local* 120 v. *Newberry Mills, Inc.*, 315 F. 2d 217 (4th Cir., 1963), *Cert. den.* 32 U.S. L.N. 3131; *Local 748 International Union of Electrical Workers* v. *Jefferson City Cabinet Co.*, 314 F.2d 192 (6th Cir., 1963); *Retail, Wholesale and Department Store Union, Local 1085* v. *Vaughn's Sanitary Bakery, Inc.*, 196 F. Supp. 633 (M.D. Pa., 1961); *Armstrong-Norwalk Rubber Corp.* v. *United Rubber Workers, Local 283*, 167 F. Supp. 817 (D. Conn., 1958); *app. dis.*, 269 F.2d 618 (2d Cir., 1959). It is true that in each of these decisions the court required arbitration. However, that conclusion only followed close evaluation by the court of the scope of the arbitration agreement, the circumstances purporting to establish repudiation or recission of the agreement by the employer, and other factors which this Court has announced as relevant to any decision whether arbitration is required of the employer. None of these decisions control here or lend support for the mechanical standards petitioner has urged on this Court as the basis for reversal of the decision below.

B. *Broad Arbitration Should Be the Policy But Not the Automatic and Inflexible Command.* We respectfully suggest that if it be announced as the law that an employer is bound always to his agreement to arbitrate, whatever the terms of the agreement and the actions of the union, the very interests which the arbitration provision is intended to protect would be put in jeopardy. Whatever the imprecision in the view that arbitration and "no-strike" clauses are "*quid pro quo*" in a technical legal sense, it is never-

theless the common and justifiable understanding that these provisions are ordinarily viewed by the negotiating parties as correlatives. *Lincoln Mills, supra*, at 455; *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 567; *Warrior & Gulf Co., supra*, at 583. Should this Court approve an absolute restriction preventing the employer from enforcing his contractual guarantee of freedom from strikes except through the mechanics of arbitration, employers, as Mr. Justice Brennan has suggested, "will pause long before committing themselves to obligations enforceable against them but not against their unions." *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 227 (dissenting opinion).

We might note that at least one commentator and labor counselor has urged employers to insure themselves against any such one-sided rule by excluding both the arbitration and no-strike clauses from bargaining agreements. Robert Lewis, *The Long Pause*, C.C.H. Labor Law Journal, March, 1963, p. 277. And at least one major corporation apparently has given this advice at least partial heed in its most recent negotiations. See report of bargaining between General Electric Company and the Electrical Workers (IUE) in the Bureau of National Affairs Labor Relations Reports, Vol. 54, pp. 41-43, 97-98, 117-18, 144-47. Respondent also fails to perceive how tranquil and harmonious labor relations, the objective behind mutual pledges to arbitrate and not to strike, will be served by a rule of law which, in exalting arbitration, strips it of its only appeal to one of the two parties which must agree to its incorporation into the collective bargaining contract.

III

The Court Below Correctly Held that Arbitration Was Not Required

The validity of the respondent's repudiation of the collective bargaining agreement cannot be determined by any mechanical application of a presumption in favor of arbitration or rigid rule of law distinguishing the arbitrable from the non-arbitrable. We believe the court below properly held, on the facts of record, that the respondent was no longer obliged to arbitrate alleged grievances arising out of the termination of the employment of 191 employees.

A. *Respondent Was Relieved of Its Obligation to Arbitrate.* *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254, we believe, best lays out the circumstances which will be considered in deciding whether a union's breach of a no-strike provision has the effect of freeing the employer of a commitment to arbitrate grievances, or other disputes. Primary, of course, are the terms of the arbitration provision itself, 370 U.S. 254, 257. Next in importance, perhaps, is the attitude or the position espoused by the employer, following the alleged breach by the union, with respect to the continuity of the collective bargaining contract, 370 U.S. 254, 261. Finally, the seriousness of the breach, its nature and duration, have an important and realistic relevance to the issue, 370 U.S. 254, 265. Collectively, these standards represent sound law and sensible labor policy. Judged in the light of these guides, the Iowa courts properly concluded that the respondent had been relieved of its contractual obligation to arbitrate the grievances submitted by the union following the walkout and strike underlying in this case.

1. The scope of the commitment to arbitrate would appear to be paramount. Where an employer, as in *Drake Bakeries, supra,* commits itself, or reasonably appears to have committed itself, to arbitrate disputes and grievances whether or not the union complies with its contractual obligation not to strike, it should not be heard to complain when a court requires it to do no more than that to which it has agreed or reasonably appears to have agreed. "[B]y agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes." 370 U.S. 254, 262. Toward the other extreme lies the contract, such as the one involved here and the one in issue in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, which this Court interpreted as "not susceptible to a construction that the company was bound to arbitrate its claim for damages against the union for breach of the undertaking not to strike." The differing result in *Atkinson, supra,* as opposed to *Drake Bakeries, supra,* where arbitration was compelled, arises directly out of the Court's recognition that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241.

This attitude did not originate in these two landmark decisions. Both prior to and since those holdings, inferior federal courts considering the close correlation of no-strike and arbitration provision have held the breadth of the arbitration clause to be determinative. Compare three recent decisions of the Sixth Circuit. In *Vulcan-Cincinnati Inc.* v. *United Steelworkers,* 289 F.2d 103 (6th Cir., 1961) and in *International Union* v. *Benton Harbor Malleable Industries,* 242 F.2d 536 (6th Cir., 1957) the Sixth Circuit did not

require arbitration of damages for alleged breach of the no-strike clause, as the arbitration clauses were narrowly limited to employee grievances. Conversely, in *Jefferson City Cabinet Co.* v. *International Union*, 313 F.2d 231 (6th Cir., 1963), *cert. den.*, 373 U.S. 936, the court compelled arbitration of damages, pointing out that the arbitration clause, unlike that in issue in the two earlier cases cited, contemplated arbitration of employer grievances as well.

The arbitration provision in issue here, as the provision before the Court in *Atkinson, supra*, is limited in coverage. It is the fifth step in a carefully drawn procedure established for processing of *employee* grievances only; arbitration is available only "upon the request of the Union." Neither respondent nor petitioner has obligated itself to arbitrate employer grievances, with respect to which the employer is free to pursue such other remedies as may be available. Moreover, the union has conceded, implicitly at least, that, no "claim for damages for [the petitioner's] alleged violation of a no-strike clause is the subject of grievances or otherwise before [the Iowa Supreme Court] . . ."[8] If respondent did not bargain away its right to maintain action for breach of the no-strike clause, surely that is additional and significant evidence that the scope of the arbitration clause does not reach to embrace walkouts or strikes amounting to a substantial breach.

2. The employer's actions following breach of the no-strike provision also are of importance. Thus, in striking down an employer's bid to avoid arbitration, the Court in *Drake Bakeries, supra*, 370 U.S. 254, 261, stressed that:

> "The company has not attempted, or claimed the right, either to terminate the entire contract or to extinguish permanently its obligations under the ar-

[8] Appellants' Reply Brief before the Iowa Supreme Court, p. 13.

bitration provisions. Instead, it has sued for damages for an alleged strike and, as far as this record reveals, the contract continued in effect, as did the promises of the parties to arbitrate and the promise of the union not to strike.''

To like effect, see *Local 748 International Union of Electrical Workers* v. *Jefferson City Cabinet Co.*, 314 F.2d 192 (6th Cir., 1963), and *United Textile Workers of America* v. *Newberry Mills, Inc.*, 315 F.2d 217 (4th Cir., 1963), *cert. den.*, 32 U.S.L.W. 3131, both stressing, as in *Drake Bakeries, supra*, the employers' ambivalent reaction to the unions' breach, and in each case concluding that the employer concerned had not unequivocally repudiated further continuation of the contract.

This attitude that the employer should not be permitted to have it both ways has a threefold basis. As a practical matter, a party's actions following an alleged breach of a contract, to a degree at least, reflect his understanding of his rights and obligations under the contract. Moreover, as a matter of hornbook contract law, a party to a contract which has been materially breached by the other party must elect either to repudiate the contract in its entirety or to continue the contract in effect and seek relief by suit for damages for breach. Ordinarily, he does not have an option to take a middle course; a litigant cannot affirm and disaffirm a contract at the same time. *Paskvan* v. *Mesich*, 227 F.2d 646, 650 (9th Cir., 1955).

Finally, and most importantly, requiring the employer to elect either to abide by the contract or to repudiate it makes good labor relations sense. The collective bargaining agreement contemplates a continuing relationship between management and union. The grievance procedure and no-strike clause together provide the intended basis for insuring that this relationship remain stable. Such

stability is important both to management and to labor. Where, however, because of breach of a no-stike provision, the relationship between union and management has deteriorated to the unfortunate point where the employer is willing to cast off the contract and sever all relations with the union, arbitration is most unlikely to produce its intended tranquilizing results. In these circumstances, the absence of arbitration cannot further disrupt labor-management relations. This was the interpretation given the above quoted language of *Drake Bakeries, supra*, by one Federal District Court, which refused the union's demand for arbitration where it would not have been beneficial in the existing industrial setting. *United Garment Manufacturing Co.* v. *Minnesota Joint Board*, 211 F. Supp. 414 (D. Minn., 1962). In that decision, the employer had closed down its plant and ceased operations following a strike by defendant union. While the case is perhaps the epitome of a complete collapse of labor-management relations, it does illustrate that an extended strike can justify an abandonment, however drastic, by the employer. 221 F. Supp. 414, 419.

The record establishes, we believe, that this respondent repudiated its collective bargaining obligations, unequivocally and in full, as a direct result of the strike (R. 41). Surely, a cessation of operations is not the only manifestation by which to prove an abandonment of the agreement.

3. If labor law is to be related to the realities of labor relations, certainly the nature of the strike looms as a very significant factor to be considered in determining in a particular case whether an employer is discharged of an obligation to arbitrate. Thus, the Court in *Drake Bakeries, supra*, emphasized that it was dealing with a "one-day strike." This would seem no more than a logical application of the

traditional legal position against dealing with trifles. In the important area of collective bargaining relations, a total disruption quite properly should not be allowed over a trivial infraction of even as important a provision of the agreement as the no-strike clause.

As we have shown below, however, the record reveals that the strike which provoked this respondent to repudiate the collective bargaining agreement was no trivial infraction of the union's guarantee, but was of extended duration.

In sum, therefore, the Iowa courts, under a contract containing no express or fairly implied guarantee by the employer to arbitrate following breach of the no-strike clause, found respondent no longer obligated to arbitrate, because it had unequivocally repudiated the collective bargaining contract following a gross and continuing breach of the no-strike clause. The conclusion of the courts below that the respondent was relieved of the obligation to arbitrate may have rested on grounds not too persuasively articulated in their opinions. Nevertheless, the result reached was correct in the light of the controlling criteria emerging from this Court's decisions in *Drake Bakeries, supra,* and in *Atkinson, supra.*

B. *The Presumption in Favor of Arbitration is Rebutted in This Case.* The issue of arbitrability, we believe, is always a question in the first instance for the courts, *United Steelworkers* v. *Gulf Nav. Co.*, 363 U.S. 574, 582; *Drake Bakeries, supra,* at 256. In the doubtful case the presumption is, and from the point of view of harmonious labor-management relations, perhaps should be, in favor of arbitration's coverage, *United Steelworkers* v. *Gulf Nav. Co., supra,* at 583. On the other hand, where a party seeking arbitration presses so far as to claim that not only is the decision of the merits of a grievance "excluded from court determination", but also "the question of arbitra-

bility," the burden borne and the presumption working, shift against that party, *United Steelworkers* v. *Gulf Nav. Co.*, *supra*, at 583, f.n. 7; cf. Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L.R. 1482, 1508-09 (1959).

The petitioner attempts to relieve courts of any obligation to resolve the issue of arbitrability by a disarmingly simple line of argument. "Not all strikes violate no-strike clauses" [p. 21]. In deciding that the strike involved in this case violated the no-strike clause, the Iowa Supreme Court "usurps the function of the arbitrator. . . ." [p. 22]. This is so, the petitioner maintains, because it "was virtually impossible for the courts below to decide that the asserted strike waived the right to arbitrate without intruding upon" the fundamental grievance question, i.e., "whether participation in the alleged strike constituted just cause for discharge." [p. 14]. Respondent shows below that either singly or in argumentative combination the above-stated propositions fail to carry the petitioner's case.

1. Citing this Court's decision in *Mastro Plastics* v. *N.L.R.B.*, 350 U.S. 270, petitioner asserts that not every strike is a violation of a no-strike clause, and argues that no violation has in fact occurred here. We note initially that petitioner's reliance on *Mastro* is demonstrably misplaced. That decision, as petitioner contends, did hold that not all strikes violate a no-strike clause, even one written in absolute terms. The underlying circumstances there involved, however, presented "a flagrant example of interference by the employers with the expressly protected right of their employees to select their own bargaining representative." [p. 278]. This Court, construing the no-strike provision in its contractual setting as a guarantee only against strikes over the "*economic* relationship between employers and their employees," found such a pro-

vision appropriate, provided that "the selection of the bargaining representative remains free." (Italics supplied) [p. 280]. Because the strike evolved from the employer's interference with the employees' free selection of their bargaining representative, the no-strike guarantee was held inapplicable in that case. The strike which furnishes the background for the case at bar, however, arose over alleged seniority rights (R. 39), one of the categories of economic issues which the union had contracted to put to arbitration, not self help. In electing to pursue the latter it waived the former, as the courts below correctly concluded.

2. The strike in this case, by petitioner's own admission, related to an issue clearly committed to arbitration under the contract for which the grievance procedure was expressly available to the petitioner or to the members of its union. On the other hand, as shown above, the question of a breach of the no-strike clause represents an issue just as clearly *removed* from the applicability and the scope of the arbitration procedure set up in the contract, since by its express terms only *employee*, not employer, grievances were covered (R. 19).

We do not believe, therefore, that the Iowa courts usurped "the function of the arbitrator" in deciding that the petitioner's election to take up the weapons of self-help rather than abiding by the grievance procedure, which, under the contract, was available only to it, constituted such a material breach of the collective bargaining agreement as to justify the respondent's repudiation of it. The record is perfectly clear that the courts below did not pass upon the justness of the discharges in the wake of the walkout and strike, but held only that if the petitioner had a remedy it was not arbitration, which it had waived by striking. The trial court said:

"Plaintiff argues that the arbitrator and not the Court should determine whether the walkout was a violation of the terms of the contract or whether it may have been justified by the conduct on the part of defendant. The fact is, however, that this Court is not concerned for the present purpose with whether or not the walkout was justified or whether or not filing a claim with the National Labor Relations Board was not a matter that the arbitrator could have determined. This court is only concerned with the fact that the plaintiff *did* do these things, and the law is clear that where the parties have agreed to arbitrate and that agreement is a quid pro quo for an agreement not to strike or to lockout, the election to strike or lockout constitute a waiver and election of remedies." (R. 48-49)

Nor is their anything in the Iowa Supreme Court's opinion which suggests that it took a broader view of the question. The governing issue before the Iowa courts was the propriety of the employer's repudiation of a collective bargaining contract, including its arbitration provisions. As this Court, we believe, made clear in *Atkinson* v. *Sinclair Refining Co., supra,* the union cannot, merely by the assertion of an employee grievance, compel arbitration of an issue which only the employer would raise and which therefore was excepted from the mechanics of the arbitration procedure established for the union's sole benefit. Any other result would abort this Court's careful delineation in *Drake Bakeries, supra,* of the circumstances under which an employer could be relieved of its obligation to arbitrate. For by the mere assertion of a grievance over the employer's conduct following the repudiation, the union could vitiate the very effect of the repudiation.

C. No Relevant Facts Are in True Dispute. Petitioner, finally, attacks the decision below on the ground that there exists a dispute as to whether a strike occurred. Here, the petitioner's "denial" consists of a claim that it had not authorized the strike. However, this denial is accompanied by petitioner's admission that "certain of defendants' employees within the bargaining union, represented by plaintiff, left their jobs at defendants' plant," and was made in the context of a claim by petitioner for reinstatement of the employees who had concededly walked out and was coupled with a defense of the justness of the strike. Respondent's amended answer, which was not contested,[4] asserts further:

> * * *that on May 11, 1961 the said 190 persons and the said Anton Stamoulis left their jobs and the premises of defendant after being each notified that said action was a breach of contract. Defendant alleges further that on the 12th day of May, 1961 defendant addressed a letter to each of the 191 employees inviting them to return to work immediately and advising them that their leaving was in breach of contract and that if they did not immediately [fol. 59] return, their jobs would be filled by permanent replacements. The said letter further advised said employees that their alleged cause of leaving the work, to wit: the discharge of Anton Stamoulis, would be processed as

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[4] Rule 73 of the Iowa Rules of Civil Procedure, "Reply," provides that:

"There shall be a reply to a counterclaim, and to new matter in an answer, responding thereto in the same manner that an answer responds to a petition, but not inconsistent with the petition. Points of law arising on the face of the answer may be raised by reply."

Under Rule 102 of the Iowa R.C.P., with exceptions not pertinent here, the failure to deny allegations of fact in an amended answer constitute an admission of them.

a grievance under the terms of Section 33 of the contract Exhibit "A". Thereupon and on or about May 15, 1961, *at a formal called meeting of plaintiff Union, plaintiff and its members unanimously rejected the offer of defendant that they return to work and that the Stamoulis matter be handled as a grievance, and the said plaintiff advised defendant on* or about May 15, 1961 of their rejection. * * * (R. 41). [Italics supplied].

It was against this background that the trial court, while recognizing that it could not settle any issue turning upon disputed facts, concluded:

"Even though it is alleged that Union officers advised against the walkout, it, nevertheless, occurred and the Union is apparently supporting the action of the employees. There is no substantial dispute here as to the facts." (R. 48).

The Supreme Court took an identical view of the uncontested facts:

"It is not seriously contended in this court that the 190 workers did not walk off the job and are still refusing to return thereto." (R. 56).

Moreover, it should be noted that the trial court was most familiar with the circumstances of the strike, since one month before the suit in question was filed that same court, after a full hearing, had issued a permanent injunction against "mass picketing, threats, violence and intimidation" by officers and members of the petitioner. See fn. 1 *supra*. It is not plain whether the court took judicial notice of this prior proceeding. Certainly, the public events, widely reported, which formed the background of that proceeding,

fell fairly within the permissible scope of proper judicial notice. *Cf. Donnelly Garment Co.* v. *Dubinsky*, 55 F. Supp. 587, 594 (W.D. Mo. 1944), affirmed, 154 F.2d 38 (8th Cir., 1946); *N.L.R.B.* v. *Fresh'nd Aire Co.*, 226 F.2d 737 (7th Cir., 1955). Whether it did or did not invoke judicial notice, however, the admissions of record appear adequate to justify the trial court's finding of an obvious, intentional, and severe violation of the terms of the broad no-strike clause.[5]

While the bare pleadings without more possibly might support the petitioner's argument that the decision below rested "on unproved facts," the complete record demonstrates that the pleadings have been pierced, in effect, as a result of the petitioner's own critical admissions, as well as by the controlling applicability of pertinent rules of Iowa civil procedure and a reasonable understanding of the permissive use of the doctrine of judicial notice. If the petitioner has a complaint about the propriety of the Iowa procedure which was observed in this case, or of the adequacy of the Iowa court's conclusions with respect to the critical facts, i.e., that the employees walked out, that the petitioner sanctioned and supported the strike over a long period of time, and that, as a consequence, the employer terminated the agreement, surely that complaint cannot be reviewed by this Court, in the absence of any showing that important federally protected rights were impaired by the procedure applied or as a result of the factual conclusions

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[5] The no-strike clause expressly prohibits the employer from engaging in a work stoppage or a strike *and* the union from calling or sanctioning them (R. 8-9). Thus, even if the petitioner's denial that it approved a strike, its position would not be improved. As to the 191 employees who walked out, arbitration has been waived and its these alleged discharges, and no others, which the petitioner attempted to raise through the grievance procedure.

arrived at, *Egan* v. *Hart*, 165 U.S. 188, 189; *Grayson* v. *Harris*, 267 U.S. 352, 357; Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1951 ed.), p. 196.

Moreover, even if the petitioner was correct in contesting the adequacy of the factual showing on which the decision below rested, should the case be remanded to establish by evidence what already has been fairly established on the basis of the pleadings and by petitioner's admissions of record? Respondent respectfully submits that if this Court agrees that the apparent, but perhaps not yet formally proven, facts of record can support the decision reached below, it should affirm that decision, rather than remand the case for further proceedings in the lower courts to establish what both parties know, and the courts below justifiably assumed, are the material facts on which this case must turn.

IV

Filing Unfair Labor Practice Charges Is Not a Waiver of the Right to Arbitrate

The Iowa trial court concluded that petitioner, by filing an unfair labor practice charge with the National Labor Relations Board, had waived its rights to proceed pursuant to the arbitration provisions of the contract. Respondent did not expressly urge this in the Iowa Supreme Court as a basis for affirming the trial court. And the Iowa Supreme Court did not expressly pass on the point.

We are persuaded that, with respect to this one issue, and this one issue alone, the petitioner is correct. We make express note of our views at this point in order not to consume the Court's time on an issue neither urged nor decided below and abandoned here.

Conclusion

For the reasons stated, respondent respectfully suggests that the writ of certiorari was improvidently granted in this case, but that if the merits are properly before the Court the decision of the Iowa Supreme Court should be affirmed.

Respectfully submitted,

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